Religious Arbitration and the Establishment Clause

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Religious arbitration agreements—which compel parties to resolve their private legal disputes before a religious tribunal or according to religious doctrine—are often enforced by courts. This Article argues that their enforcement may violate the Establishment Clause. In particular, the "nondelegation doctrine"—first articulated in Larkin v. Grendel's Den*—limits the government's ability to delegate its power to religious institutions. The concern is not that the government would entangle itself in religious affairs, but the opposite: that religious institutions would acquire control over a core governmental function. Under this doctrine, the enforcement of religious arbitration agreements may constitute a delegation to religious institutions of a core governmental function, namely, the adjudication and enforcement of the private law. Such a delegation of governmental authority may be problematic either because it favors some religious groups over others, or because it allows religious institutions to acquire unchecked authority over their members and participants. Additionally, this Article argues that enforcement of religious arbitration agreements is not required by other Establishment Clause doctrines such as the "religious question" doctrine or the principle of neutrality toward religion.*

I. INTRODUCTION

Religious arbitration agreements, whereby parties agree to resolve legal disputes through a religious tribunal or according to religious doctrine, are becoming an increasingly visible feature of the American legal landscape.[1] Such agreements may be found in a variety of contracts—including employment contracts, service agreements, and prenuptial agreements—especially when contracts are executed with, or under the purview of, a religious institution or service provider. Courts have typically enforced religious arbitration agreements, in accordance with the sweeping presumption in favor of enforcing arbitration agreements generally.[2]

This Article argues that despite the pro-enforcement status quo, courts and commentators should take seriously the possibility that the judicial enforcement of religious arbitration agreements may violate the Establishment Clause.[3] While scholars have raised a number of arguments both in favor of and against the judicial enforcement of religious arbitration clauses,[4] little sustained attention has been paid to whether such enforcement is

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[1] For recent discussions of religious arbitration, *see generally* Michael A. Helfand, *Arbitration's Counter-Narrative: The Religious Arbitration Paradigm*, 124 YALE L.J. 2994 (2016) and Michael Corkery & Jessica Silver-Greenberg, *In Religious Arbitration, When Scripture Is the Rule of Law*, N.Y. TIMES, Nov. 3, 2015, at A1.

[2] For seminal cases involving religious arbitration agreements, *see generally* Encore Prods., Inc. v. Promise Keepers, 53 F. Supp. 2d 1101 (D. Colo. 1999) (enforcing arbitration clause in commercial contract according to which the arbitration would be conducted according to rules promulgated by the Institute for Christian Conciliation) and Greenberg v. Greenberg, 238 A.D.2d 420 (N.Y. App. Div. 1997) (vacating spousal support award issued by Family Court on the grounds that the wife had signed an agreement requiring that all disputes between husband and wife be submitted to a "Bais Din" or Rabbinical Court).

[3] U.S. CONST. amend. I.

[4] For arguments in favor of enforcement, *see, e.g.*, Farrah Ahmed & Senwung Luk, *How Religious Arbitration Could Enhance Personal Autonomy*, 1 OXFORD J.L. AND RELIGION 424 (2012) (arguing that judicial enforcement of religious arbitration agreements may enhance the individual autonomy of religious believers) and Eugene Volokh, *Religious Law (Especially Islamic Law) in American Courts*, 66 OKLA. L. REV. 431 (2013) (arguing that enforcement of religious arbitration agreements may be protected by state and federal religious freedom laws). For a critical assessment of religious arbitration agreements, *see* Shiva Falsafi, *Religion, Women, and the Holy Grail of Legal Pluralism*, 35 CARDOZO L. REV. 1881, 1882 (2014) (suggesting that "unfettered religious autonomy runs the risk of excluding parties to religious contracts from the civil courts, thereby potentially compromising important individual liberties").

constitutional.[5] When courts have considered the question, they have typically assumed that the constitution would require enforcing religious arbitration agreements, either to avoid religious entanglement or to preserve government neutrality toward religion.[6] But these are not the only relevant Establishment Clause issues. Another, potentially more worrisome, concern is that judicial enforcement of religious arbitration agreements would allow religious institutions to acquire effective control over the government's power to enforce the civil law. As such, enforcement of religious arbitration agreements may run afoul of the Establishment Clause's "nondelegation doctrine," according to which the government may not delegate its power to religious institutions where that delegation results in a fusion of governmental and religious functions.[7] The origin of the nondelegation doctrine is *Larkin v. Grendel's Den*, in which the Supreme Court struck down a state law granting churches the power to veto liquor licenses on the grounds that the law was an impermissible delegation of the government's authority to religious

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[5] For the most direct discussion of the enforceability of religious arbitration agreements under the Establishment Clause, *see* Michael A. Helfand, *Religious Arbitration and the New Multiculturalism: Negotiating Conflicting Legal Orders*, 86 N.Y.U. L. REV. 1231, 1244–45 n.61 (2011) and accompanying text (noting that courts have consistently rejected Establishment Clause arguments against enforceability of religious arbitration agreements) and at 1272–79 (discussing the application of Establishment Clause doctrine, including *Kiryas Joel*, to religious arbitration agreements). *See also* Jodi M. Solovy, *Civil Enforcement of Jewish Marriage and Divorce: Constitutional Accommodation of a Religious Mandate*, 45 DEPAUL L. REV. 493 (1996) (arguing that enforcement of religious arbitration agreements passes the *Lemon* test and so does not violate the Establishment Clause); Charles P. Trumbull, *Islamic Arbitration: A New Path for Interpreting Islamic Legal Contracts*, 59 VAND. L. REV. 609, 642 (2006) (arguing that courts may enforce religious arbitration agreements consistently with the Establishment Clause because they can base their decisions on "neutral principles of law" and do not have to interpret or apply religious doctrine directly); Nicholas Walter, *Religious Arbitration in the United States and Canada*, 52 SANTA CLARA L. REV. 501, 521–27 (2012) (discussing enforcement of religious arbitration awards over First Amendment objections).

[6] *See* Encore Prods., Inc., 53 F. Supp. 2d at 1112–13 (arguing that enforcement of the religious arbitration agreement allows the court to "apply neutral principles of law to determine disputed questions that do not implicate religious doctrine") and Meshel v. Ohev Sholom Talmud Torah, 869 A.2d 343, 354 (D.C. 2005) (holding that compelling arbitration before a rabbinical court did not violate the First Amendment because "the resolution of appellants' action to compel arbitration will not require the civil court to determine, or even address, any aspect of the parties' underlying [religious] dispute").

[7] *See* Larkin v. Grendel's Den, Inc., 459 U.S. 116, 126 (1982) (striking down on Establishment Clause grounds a state statute that delegated churches the power to reject certain liquor license applications).

institutions.[8] Similarly, by enforcing a religious arbitration agreement, the court may be impermissibly delegating its authority to adjudicate and enforce the private law to religious institutions or religious leaders. The enforcement of secular arbitration agreements does not raise comparable issues, because the delegation of governmental authority, if any, is not being made to a religious institution.[9]

Delegating the government's authority over the private law to religious authorities may be problematic for two reasons. First, such a delegation may tend to favor some religious groups over others, in violation of the basic principle of government neutrality with respect to religion.[10] Even a general policy of enforcing religious arbitration agreements may result in extra benefits for those religious groups that are more legally sophisticated. Second, the enforcement of religious arbitration agreements may have the effect of coercing participation in religious institutions, or imposing steep costs on ending one's membership or affiliation. In this respect, enforcement of religious arbitration agreements may conflict with the state's role in ensuring that religious institutions are "voluntary associations."[11] These arguments against enforcement of religious arbitration agreements are consistent with the potential religious value of alternative dispute resolution. Even if courts decline to enforce religious arbitration agreements, other alternative dispute resolution mechanisms would remain available. For example, religious persons may continue to employ nonbinding religious arbitration or mediation to reach mutually acceptable settlements of legal disputes. And parties who are motivated by their religious beliefs to avoid utilizing civil courts may continue to employ secular arbitration agreements in their contractual relationships.

This Article is divided into four parts. Part I provides a basic overview of religious arbitration agreements and their enforceability under existing

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[8] *Id.* Note that the Establishment Clause "nondelegation doctrine" described in this Article is not to be confused with the seldom-enforced Article I "nondelegation doctrine" according to which Congress may not pass a law that effectively delegates law-making authority to executive agencies.

[9] *Id.* at 122 ("We need not decide whether, or upon what conditions, such power may ever be delegated to nongovernmental entities.").

[10] *See* Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 222 (1963) ("The wholesome 'neutrality' of which this Court's cases speak thus stems from a recognition of the teachings of history that powerful sects or groups might bring about a fusion of governmental and religious functions.").

[11] *See* John Rawls, A THEORY OF JUSTICE, 212 (1971) ("[A]ssociations may be freely organized as their members wish, and they may have their own internal life and discipline subject to the restriction that their members have a real choice of whether to continue their affiliation.").

contract law doctrine. Part II describes and motivates the Establishment Clause nondelegation doctrine stemming from *Larkin v. Grendel's Den*. Part III argues that enforcement of religious arbitration agreements may be unconstitutional under the Establishment Clause nondelegation doctrine. Finally, Part IV argues that another Establishment Clause doctrine—the religious question doctrine—does not require enforcement of religious arbitration agreements.

II. RELIGIOUS ARBITRATION AGREEMENTS AND CONTRACT LAW

A "religious arbitration agreement" may be defined as a contract or contractual provision according to which parties agree to resolve some or all of their past or future legal disputes through a religiously affiliated arbitrator, which arbitrator may be a religious leader, a representative of a religious institution, or a lay person who will conduct the arbitration and issue an award by reference to specific religious rules or doctrines.[12]

A. *Examples of Religious Arbitration Agreements*

Religious arbitration agreements are employed in a variety of contexts. In some cases, religious institutions have employed religious arbitration agreements when entering contractual relationships with their members. These agreements may allow religious institutions to adjudicate lawsuits brought against them by their members. For example, the Catholic Church has used binding arbitration to settle lawsuits brought against the Church by victims of sexual abuse by priests.[13] While the mediators and arbitrators were typically not official representatives of the Church, they were

[12] For a useful overview of religious arbitration and other forms of religious dispute resolution in the U.S., *see* David Masci & Elizabeth Lawton, *Applying God's Law: Religious Courts and Mediation in the U.S.*, PEW RESEARCH CTR, http://www.pewforum.org/2013/04/08/applying-gods-law-religious-courts-and-mediation-in-the-us/. *See also* Nicholas Walter, *Religious Arbitration in the United States and Canada*, 52 SANTA CLARA L. REV. 501 (2012); Caryn Litt Wolfe, *Faith-Based Arbitration: Friend or Foe-An Evaluation of Religious Arbitration Systems and Their Interaction with Secular Courts*, 75 FORDHAM L. REV. 427 (2006).

[13] Michelle Rosenblatt, *Hidden in the Shadows: The Perilous Use of ADR by the Catholic Church*, 5 PEPP. DISP. RESOL. L. J. 115, 127-9 (2005) (describing binding mediation/arbitration procedures used to settle lawsuits or to award damages by the Archdioceses of Milwaukee and Boston).

often chosen by the Church and were often seen as acting on behalf of the Church.[14]

Private individuals may also employ religious arbitration agreements, especially when entering contractual relationships with coreligionists. For example, members of many Orthodox and Conservative Jewish communities employ agreements that direct certain legal disputes to a rabbinical court or "beth din."[15] Agreements to submit legal disputes to a beth din are sometimes included in commercial contracts, such as sales of goods and property, and lease agreements.[16] They are also commonly employed as part of marriage or divorce agreements.[17] In such cases, while the spouses must go before a civil court in order to obtain a civil divorce, the court will often defer to the award of spousal support and division of marital property issued by the beth din on the grounds that the spouses agreed that the beth din's resolution of disputes between the parties would be binding.[18]

Note that these pre- or postnuptial agreements are also sometimes used to compel husbands to agree to sign a Jewish divorce or "get."[19] Under Jewish law, a husband must sign the get or the religious community will not consider the marriage to be terminated and the wife will not be released from her religious obligations associated with marriage.[20] The husband's refusal to

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[14] *Id.* at 131–33.

[15] For a description of the operation of a typical beth din (sometimes transliterated from the Hebrew to "bet din" or "bais din"), *see* Masci & Lawton, *supra* note 12. *See also* Helfand, *supra* note 5, at 1247–49; *About Us,* BETH DIN OF AMERICA, (last visited Jan. 13, 2018), https://bethdin.org/about/. The prenuptial agreement is available at: http://www.theprenup.org/pdf/Prenup_Standard.pdf.

[16] *Cf.* Zeiler v. Deitsch, 500 F.3d 157 (2d Cir. 2007) (holding that, in a property dispute between an Israeli citizen and an American citizen, where the parties have agreed to arbitrate their dispute before a Beth Din panel of three named rabbis, the panel can proceed to make an award even after one rabbi had resigned).

[17] *See* Kent Greenawalt, *Religious Law and Civil Law: Using Secular Law to Assure Observance of Practices with Religious Significance*, 71 S. CAL. L. REV. 781, 817 (1997) (discussing legal mechanisms used to compel Orthodox and Conservative Jewish husbands to submit to Jewish divorce procedures).

[18] Greenberg v. Greenberg 238 A.D.2d 420 (N.Y. 1997) (vacating spousal support award issued by the civil court on the grounds that the wife had signed an agreement requiring that all disputes between husband and wife be submitted to a "Bais Din" or Rabbinical Court).

[19] *See* discussion in Greenwalt, *supra* note 17, at 810–16. *See also* Avitzur v. Avitzur, 446 N.E.2d 136, 138–39 (N.Y. 1983) (compelling former husband's specific performance in appearing before Beth Din panel in order to initiate religious divorce proceedings, where civil divorce was already completed), *cert. denied* 464 U.S. 817 (1983).

[20] *See* Greenawalt, *supra* note 17, at 810–16.

sign the get, especially when a civil divorce has already been granted, prevents the wife from remarrying under Jewish law, and can lead to other serious social consequences for the wife within her religious community.[21] In such cases, civil courts have enforced the prior agreement by either compelling the husband's specific performance to appear before a beth din, or by refusing to grant a civil divorce until the husband submits to the Jewish divorce procedure.[22]

Drawing in part on this Orthodox Jewish model of rabbinical tribunals, some Islamic communities also employ religious courts, in which Imams and lay community leaders apply Islamic law (Sharia or Shari'ia), to resolve legal disputes between members, including family law disputes.[23] In the U.S., arbitration agreements are not often used to compel arbitration before Sharia courts, meaning that the decisions of Sharia courts usually are not binding in civil court.[24] But there has recently been an effort within some Islamic communities in the U.S. to establish organizations, modeled on the Beth Din of America, which provides standardized religious arbitration services.[25] And while some legislators have passed laws that prohibit state courts from enforcing Islamic arbitration agreements, such laws have been held to be unconstitutional because they discriminate against Islam.[26]

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[21] *Id.* at 810–11, noting that a wife who has obtained a civil divorce but not a religious divorce is known as "agunah" or "chained woman" because she is chained to her former husband.

[22] *See Avitzur*, 445 N.E.2d at 138–39 (compelling former husband's specific performance in appearing before Beth Din panel in order to initiate religious divorce proceedings, where civil divorce was already completed), *cert. denied*, 464 U.S. 817 (1983).

[23] *See, e.g.*, Masci & Lawton, *supra* note 12; *See also* Charles P. Trumbull, *Islamic Arbitration: A New Path for Interpreting Islamic Legal Contracts*, 59 VAND. L. REV. 609 (2006).

[24] *See* Helfand, *supra* note 5, at 1249–52 (noting that while the use of religious arbitration agreements among Muslims in America is not widespread, there are a number of organizations working to develop Islamic arbitration panels). Islamic arbitration agreements are more common in the United Kingdom, where the recently established Muslim Arbitration Tribunal (MAT) provides services that are similar to those provided by Beth Din of America. *See* Bilal M. Choksi, *Religious Arbitration in Ontario-Making the Case Based on the British Example of the Muslim Arbitration Tribunal*, 33 U. PA. J. INT'L L. 791, 812 (2012) (noting that in establishing the MAT, its founder "followed the Jewish example of the Beit Din rabbinical court.").

[25] *See* Helfand, *supra* note 5, at 1250 (describing the recent push for Islamic arbitration services and noting that the Fiqh Council of North America provides some such services).

[26] *Cf.* Awad v. Ziriax, 670 F.3d 1111, 1128–29 (10th Cir. 2012) (striking down as unconstitutional under the Establishment Clause an Oklahoma law prohibiting courts from

Another common type of religious arbitration agreement, often employed by Christian corporations and organizations, requires parties to submit to binding arbitration in accordance with the *Rules of Procedure for Christian Conciliation* promulgated by the Institute for Christian Conciliation (ICC), which is a nondenominational Christian organization that certifies religious arbitrators.[27] These certified arbitrators may be laypersons, but must affirm a Statement of Faith, adhere to a Standard of Conduct, and take a Peacemaker's Pledge, all of which contain explicitly religious content.[28] The rules governing the arbitration, as well as the resulting arbitration award, are justified by reference to religious doctrine, and are intended to be not only legally binding, but also to express or create religious obligations for the parties.[29] Courts have typically enforced agreements that reference the ICC and its *Rules for Christian Conciliation*.[30]

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considering Sharia law).

[27] The ICC is a division of Peacemaker Ministries, a nonprofit organization based in Colorado that was originally an offshoot of the Christian Legal Society. *See About Peacemaker Ministries*, PEACE MAKER MINISTRIES, (Jan. 19, 2018), http://peacemaker.net/about/; *History*, PEACE MAKER MINISTRIES (Jan. 19, 2018), http://peacemaker.net/history/.

[28] *See Standard of Conduct*, PEACE MAKER MINISTRIES (Jan. 19, 2018), http://peacemaker.net/project/standard-of-conduct-for-christian-conciliation/. Note that whether or not they have been Certified all persons using the ICC rules of Procedure must affirm the Statement of Faith; *see* The Institute for Christian Conciliation: Dispute Resolution Services, *Rule A.10(A): Appointment of Conciliators*, RULES OF PROCEDURE (on file with author).

[29] Among other things, these Rules provide that the Bible "shall be the supreme authority governing every aspect of the conciliation process." *See* The Institute for Christian Conciliation: Dispute Resolution Services, *Rule A.4: Application of Law*, RULES OF PROCEDURE (on file with author).

[30] There are numerous reported cases involving arbitration agreements with nearly identical language providing that legal disputes between the parties will be settled by "legally binding arbitration in accordance with the Rules of Procedure for Christian Conciliation of the Institute for Christian Conciliation." *See, e.g.,* Encore Prods., Inc., 53 F. Supp. 2d 1101, 1106 (arbitration agreement in contract for audio-visual services referring to RPCC); Prescott v. Northlake Christian Sch., 369 F.3d 491 (5th Cir. 2005) (arbitration agreement in employment contract referring to RPCC); Spivey v. Teen Challenge of Fla. Inc., 122 So.3d 986, 988 (Fla. Dist. Ct. App. 2013) (service agreement signed by patient admitted to drug rehabilitation facility providing for binding arbitration in accordance with RPCC); Higher Ground Worship Ctr., Inc. v. Arks, Inc., No. 1:11–cv–00077–BLW, 2011 WL 4738651, at*1 (D. Idaho Oct. 6, 2011) (arbitration provision in lease-and-purchase agreement providing for arbitration in accordance with the Rules of Procedure for Christian Conciliation and citing to Matthew 18:15-20 and 1 Corinthians 6:1-8); Gen. Conf. of Evangelical Methodist Church v. Faith Evangelical Methodist

These examples divide into two main categories of religious arbitration agreements: those that provide for arbitration performed by a religious leader or leaders—such as the Jewish beth din—and those that provide for a lay arbitrator applying rules that explicitly reference a religious text, such as the ICC's *Rules for Christian Conciliation*.[31] Both types are "religious" in the sense that the rules governing the arbitration, as well as the resulting arbitration award, are justified by reference to religious doctrine, and are intended to be not only legally binding, but also to express or create religious obligations for the parties.

In sum, many different types of actors—including individuals and institutions—may employ religious arbitration agreements in a range of different types of contractual relationships, and probably for a wide variety of different reasons. Moreover, religious arbitration agreements may have a variety of different structures and requirements. What these agreements have in common is that a court may enforce the agreement, thereby requiring the parties to resolve their legal dispute in a religious context—before a religious tribunal, or by reference to religious texts and beliefs.

B. *The Enforceability of Religious Arbitration Agreements Under Contract Law*

Religious arbitration agreements are contractual provisions that derive legal force from contract law, and in particular, from the presumption in favor of enforcing arbitration agreements generally. In general, arbitration is an alternative dispute resolution mechanism whereby parties resolve a private law dispute by submitting to the judgment of a third-party decisionmaker as an alternative to filing a lawsuit in civil court. Arbitration provides many of the features of a civil court proceeding, including the presentation of evidence and the opportunity to raise defenses. Parties may sometimes prefer arbitration to civil court because the costs of litigation can be controlled, the availability of some procedures (such as discovery tools) may be limited, and the proceedings can be kept private. Parties to a contract may agree to a mandatory arbitration agreement, according to which parties agree to resolve some or all of their

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Church, 809 N.W.2d 117 (Iowa Ct. App. 2011) (arbitration agreement between church and governing religious body referring to RPCC).

[31] Note that, while a party may agree to secular arbitration on the basis of a religious motivation or a religious belief that arbitration is superior to filing a lawsuit in civil court, for the purposes of this Article, I will assume that an arbitration agreement makes no reference of any kind to a religious institution or text is not a "religious arbitration agreement," even if the motivation for the parties to agree is religious.

potential future legal disputes through a specified arbitrator or according to a specified arbitration procedure. Judicial enforcement of arbitration agreements takes two main forms: A judge may grant a motion to compel arbitration and to dismiss the suit against a party who brought an action in civil court that was covered by a prior arbitration agreement; or, a judge may enforce an arbitration judgment or award, once issued, against a party who refuses to comply.[32] Appealing to contract law principles, courts have generally granted wide latitude to the parties in constructing arbitration agreements.[33] Moreover, the Federal Arbitration Act ("FAA")—the federal law governing arbitration agreements—has been interpreted to authorize or require judges to liberally enforce arbitration agreements against parties who have voluntarily agreed to them.[34]

The FAA and related state statutes create a legal presumption in favor of enforcing religious arbitration agreements. But general doctrines of contract law may place some important limits on the enforceability of religious arbitration agreements.[35] Obviously, courts will not enforce an agreement against a nonparty, or where the agreement was secured through coercion or fraud.[36] Similarly, courts have vacated awards issued by religious arbitrators

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[32] For a general discussion of the function of arbitration agreements, *see generally* Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703 (1998).

[33] *See* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 351 (2011) ("Arbitration is a matter of contract, and the FAA requires courts to honor parties' expectations.").

[34] The Federal Arbitration Act (FAA), 9 U.S.C. §§ 1–16, applies to all contracts within the stream of commerce under the Commerce Clause of the U.S. Constitution. *See* Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983) (construing Section 2 of the FAA as "a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary"); Southland Corp. v. Keating, 465 U.S. 1 (1984) (holding that the FAA applied to contracts under state law).

[35] Under Section 2 of the FAA, an arbitration agreement may be invalidated by contract defenses such as fraud, duress, or unconscionability. *But see* Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63, 68–73 (2010) (holding that where provided by the agreement, an arbitrator may determine the enforceability of the arbitration agreement).

[36] *See* Doe v. Vineyard Columbus, No. 13AP-599, 2014 WL 2781594, at *3–6 (Ohio Ct. App. June 17, 2014) (holding that there was no meeting of the minds regarding arbitration agreement where plaintiff, a church member suing the Church, had attended a "Newcomer's class" where she was allegedly presented with a booklet containing an arbitration provision referring to the ICC's Rules of Christian Conciliation, but had not signed anything containing such a provision); McArthur v. McArthur, 168 Cal. Rptr. 3d 785 (Cal. Ct. App. 2014) (declining to enforce religious arbitration agreement entered into by benefactor and trustee against a trust beneficiary who was not a party to the agreement).

when the award would violate the rights or negatively impact the interests of third parties, especially children. In particular, courts have declined to enforce the judgments of religious arbitrators with respect to child custody upon divorce, where the court judges the arbitrator's child custody award would not be in the best interests of the child.[37] In general, the decision of a court to vacate a child custody award generally does not turn on the fact that the arbitration is religious.[38]

The exploitation of an unequal bargaining position between the parties may also render an arbitration agreement unenforceable. These concerns may be more acute when religious persons feel significant pressure to agree to religious arbitration in some cases, especially if entering an arbitration agreement is necessary to maintain membership or standing in a religious community, to fulfill a perceived religious obligation, or to receive a service provided by a religious institution, such as the sanctification of marriage or religious recognition of divorce.[39] For example, in *Lieberman v. Lieberman*, a party moved to vacate an award issued by a beth din on the grounds that she had agreed to religious arbitration under threat of a "Sirov" or public "decree that subjects the recipient to shame, scorn, ridicule and public ostracism by other members of the Jewish religious community."[40] The court in this case held that threat of public shame and ostracism is not sufficient to constitute

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[37] *See, e.g.*, Hirsch v. Hirsch, 774 N.Y.S.2d 48, 49 (N.Y. App. Div. 2004) ("Disputes concerning child custody and visitation are not subject to arbitration."); Kovacs v. Kovacs, 633 A.2d 425 (Md. Ct. Spec. App. 1993) (vacating judgment of Beth Din panel with respect to child custody on grounds that trial court must independently review to ensure that the judgment was in the best interests of the child); Lieberman v. Lieberman, 566 N.Y.S.2d 490 (N.Y. Sup. Ct. 1991) (vacating Beth Din panel's award of joint custody of children on grounds that it would be averse to the children's interests). *See* Helfand, *supra* note 5, at 1288–94 (discussing courts' use of a public policy rationale to vacate religious arbitration awards).

[38] *Cf.* Brisman v. Hebrew Academy of Five Towns & Rockaway, 895 N.Y.S.2d 482 (N.Y. App. Div. 2010) (enforcing religious arbitration award over objection that it violated public policy and was irrational, by applying standard New York state law providing that "[a]n arbitration award can be vacated by a court pursuant to CPLR 7511(b) on only three narrow grounds: if it is clearly violative of a strong public policy, if it is totally or completely irrational, or if it manifestly exceeds a specific, enumerated limitation on the arbitrators' power."). Courts generally claim a *parens patriae* responsibility to employ oversight and fact-finding to determine whether a child custody award issued by an arbitrator is in the child or children's best interests. *Cf.* Jack Ratliff, *Parens Patriae: An Overview*, 74 TUL. L. REV. 1847 (1999).

[39] *See* discussion in Helfand, *supra* note 5, at 1294–1304.

[40] *See* Lieberman v. Lieberman, 566 N.Y.S.2d 490, 494 (N.Y Sup. Ct. 1991).

duress, even for one living in an insular religious community.[41] Yet, some have argued that religious pressure of this sort should in some cases be sufficient to render the arbitration agreement unenforceable on grounds of duress or procedural unconscionability.[42]

Finally, like other arbitration agreements, religious arbitration agreements may be unenforceable if they are procedurally and substantive unconscionable. [43] There may be a concern that religious arbitration agreements will tend to be substantively unconscionable because the arbitration procedure will not be fair or neutral. This concern may be especially acute where religious institutions are allowed to arbitrate their own disputes, or appoint arbitrators who are affiliated with the religious institution. For example, in *Garcia v. Church of Scientology*, the parties signed an arbitration agreement that specified no rules or procedures in advance and required all three of the appointed arbitrators be "[s]cientologists in good standing with the Mother Church.[44] However, the plaintiffs claimed that because they had been declared to be "suppressives" by the church, all Scientologists "in good standing" would be required by church doctrine to be biased against them. [45] Thus, the plaintiffs argued that their arbitration proceeding could not be conducted in a neutral manner.

The facts in this case might be sufficient for a finding of substantive unconscionability. If it was not possible for the plaintiffs to receive a fair hearing with respect to their fraud claim, the court should be reluctant to enforce the arbitration agreement against them.[46] However, the court in this

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[41] *Id.* (enforcing terms of beth din divorce settlement, including awards of spousal support and division of marital assets, over wife's objection that she had signed arbitration agreement under duress).

[42] *Cf.* Helfand, *supra* note 5, at 1294–1304 (arguing that "expanding the use of the unconscionability doctrine in the review of religious arbitration agreements could provide a doctrinal mechanism to protect religionists from the freedom-restricting qualities of religious arbitration.").

[43] *See, e.g.*, Higher Ground Worship Ctr. v. Arks, Inc., No. 1:11–cv–00077–BLW, 2011 WL 4738651, at *4 (D. Idaho Oct. 6, 2011) (denying motion to compel religious arbitration where lease-and-purchase agreement between church and a Christian construction company was found to be both procedurally and substantively unconscionable on the grounds that the property owner, Arks, retained access to civil court—for suits involving the nonpayment of rent—but the leaseholder, Higher Ground, was allowed no access to civil court).

[44] Garcia v. Church of Scientology Flag Serv. Org., No. 8:13-cv-220-T-27TBM, 2015 WL 10844160, at *2 (D. Fla. March 13, 2015)

[45] *Id.* at *11.

[46] *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985) ("By agreeing to arbitrate a statutory claim, a party does not forgo the substantive

case rejected the plaintiffs' arguments on the grounds that the Establishment Clause would prohibit the court from investigating whether Scientologist arbitration proceedings are fair.[47] Thus, while there may be concerns about the fairness of religious arbitrators with respect to certain claimants or certain claims, courts may be reluctant to pry too deeply into the inner workings of a religious arbitration procedure.

In sum, courts generally treat religious arbitration agreements on a par with secular arbitration agreements. Religious arbitration agreements are liberally enforced under the FAA and related state statutes that authorize courts to enforce arbitration agreements generally. Judicial enforcement of religious arbitration agreements has been limited only by contract law doctrines that also apply to secular arbitration agreements, such as fraud, duress, and unconscionability. In some cases, such as *Garcia*, courts have held religious arbitration agreements to be enforceable even where a secular arbitration agreement might not be, on the grounds that the Establishment Clause prevents courts from investigating the adequacy of the religious arbitration procedure. The rest of this Article will consider an argument based in the Establishment Clause that has not been considered by courts, namely, that enforcement of religious arbitration clauses constitutes an impermissible delegation of government authority to religious institutions or groups.

III. THE ESTABLISHMENT CLAUSE "NONDELEGATION DOCTRINE"

As discussed in Part I, courts generally enforce religious arbitration agreements so long as they are enforceable under basic contract law. But the religious nature of these agreements raises a question about their enforceability under the First Amendment's Establishment Clause. The current Establishment Clause doctrine is rather fragmented, with several different tests used to decide different types of cases.[48] As a result, its application is unsettled and often open to debate.

In order to set up arguments in subsequent sections of this Article, Part II will describe one specific Establishment Clause doctrine: the nondelegation doctrine. According to the nondelegation doctrine, the government may not

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rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.").

[47] *Id.* (noting that the Church's International Justice Chief testified that the procedures would be neutral, but that the "First Amendment prohibits consideration of this contention").

[48] *See* Kent Greenawalt, *Quo Vadis: The Status and Prospects of "Tests" Under the Religion Clauses*, 1995 SUP. CT. REV. 323 (1995).

delegate important powers—especially legal functions—to religious bodies where that delegation results in a "fusion of governmental and religious functions."[49] The nondelegation doctrine was first articulated in *Larkin v. Grendel's Den*, a case involving a state law that granted any church (or place of worship) the power to veto an application for a liquor license application within 500 feet of church property.[50] Drawing an analogy to arrangements in England at the time of the framing, whereby church officials held legal control over the liquor trade, the Supreme Court struck down the law on the grounds that it delegated the government's authority to grant liquor licenses to religious institutions, resulting in a "a fusion of governmental and religious functions."[51]

A subsequent case reflects a similar concern about religious institutions acquiring control over the state's policymaking authority. In *Kiryas Joel Village School District v. Grumet*, the Court struck down a state law authorizing the creation of a public school district designed to exclusively serve a Hasidic Jewish community in upstate New York.[52] A plurality of the Justices reasoned that the state law was an impermissible delegation under *Larkin* because it allowed a religious group—in particular, the religious leaders of the village—to effectively take control of the town's public school district.[53] Although the delegation in this case was indirect—a result of the fact

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[49] *See* Larkin v. Grendel's Den, 459 U.S. 116, 126 (1982). Note that there has been disagreement among the Justices as to how the nondelegation doctrine fits into Establishment Clause doctrine. Justice Blackmun argued that it is an application of the second and third prongs of the *Lemon* test in *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 710 (1994) (Blackmun, J., concurring). On the other hand, Justice O'Connor argued that it stands apart from the *Lemon* test. *Id.* at 720–21 (O'Connor, J., concurring). For a standard statement of the nondelegation doctrine, *see* "Excessive entanglement rule" 16A Am. Jur. 2d *Constitutional Law* § 441 (the government may not delegate its authority on the basis of religious criteria where said delegation would result in a "fusion" of government and religious functions).

[50] *Larkin*, 459 U.S at 126.

[51] *Id.* at 126–27 n. 10, (citing Sch. Dist. of Abington Twp. v. Schempp, 374 U. S. 203, 222 (1963) and 26 Geo. 2, Ch. 31, § 2 (1753) (church officials in England were given authority to grant certificate of character, a prerequisite for an alehouse license)).

[52] *Kiryas Joel*, 512 U.S. at 690 (holding that creation of school district by state legislature intended to serve a village populated exclusively by members of a single Jewish community violated the Establishment Clause). Note that although Justices Kennedy and O'Connor concurred in judgment, they each based their opinion on somewhat different grounds. Justice O'Connor, was concerned to distance her opinion from the controversial *Lemon* test, not from the nondelegation rationale found in *Larkin*. *See id.* at 718–19 (O'Connor, J., concurring) (citing Lemon v. Kurtzman, 403 U.S. 602 (1971)).

[53] *Id.* at 696–97, 699 (citing *Larkin*, 459 U.S. at 122).

that a single religious group occupied an entire town—the plurality reasoned that the delegation of governmental authority was unconstitutional in a similar way.[54] It is debatable whether such an indirect delegation raises the same problems as the direct delegation in *Larkin*.[55] But if the leaders of the Hasidic community had been able to exercise control over the district's school board, the concern is that they would acquire an ability to create and implement policies in the name of the school district. The impermissible fusion in this case would result from the fact that these religious leaders acquired effective control over the governmental function of administering the public schools. Extrapolating from *Larkin* and *Kiryas Joel*, there may be an Establishment Clause concern where three conditions obtain: (i) the government makes a religion-specific delegation (ii) to a religious institution or institutions, (iii) which allows that institution to acquire effective control over a core governmental power such as legislation or policymaking.

Such a delegation is problematic for at least two reasons. First, the delegation creates the risk that religious institutions may shape the policies so as to favor their own religious ends or purposes, rather than those of the community. That is, religious institutions that acquire legal authority may seek to benefit those who are affiliated with their religious group or use the state's authority to impose religious rules on their own members. For example, a school district designed to serve a single religious community, such as Kiryas Joel, may limit the ability of some students to access public education within the district. The school district might implement policies that exclude or disadvantage non-Jewish students. Or, alternatively, the district might implement policies designed to exclude Jewish students from public school so that they will be required to attend parochial school.[56]

Second, a delegation of the state's legislative authority to religious institutions is problematic because it puts a religious institution in a position where it can directly control the community's shared normative and legal

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[54] *Id.* at 704–05.

[55] Note that Justice Scalia argued in dissent that the plurality opinion elided a distinction between the religious leaders of the Jewish community in *Kiryas Joel*, and the residents of the village who have actual legal authority to elect members of the school board. See *Kiryas Joel* 512 U.S. at 734–35 (Scalia, J., dissenting). It may have been likely that the voters would elect religious leaders who would have run the school district in a way that reflects the values and policies of the religious group—but this is an assumption not based on the factual record of the case. But for my purposes, I will assume that the plurality opinion represents a useful doctrinal point, so long as we assume that the religious institution would have acquired effective control over the town's school board. It does not matter for my purposes whether the case itself was correctly decided.

[56] *Compare* to *Kiryas Joel* 512 U.S. at 694 (noting that all children in the village aside from special education students attend Jewish parochial schools).

agenda and goals via legal or political mechanisms. Even if the rights and interests of individuals are unaffected by the delegation—e.g., if the churches in *Larkin* never vetoed a liquor license application—the delegation is problematic because religious institutions could insert their normative reasoning and judgment into the community's legislative or policymaking process. This decentralization of legal authority would result in the loss of a shared normative space where all citizens can interact as equals.

IV. WHY ENFORCEMENT OF RELIGIOUS ARBITRATION AGREEMENTS MAY VIOLATE THE ESTABLISHMENT CLAUSE

This Part of the Article argues that enforcement of religious arbitration agreements may be an impermissible delegation under the Establishment Clause nondelegation doctrine discussed in Part II. As discussed above, whether a delegation is problematic turns on whether (i) the government makes a religion-specific delegation, (ii) to a religious institution or institutions, (iii) which allows that institution to acquire effective control over a core governmental power such as legislation or policymaking. Thus, the question of whether the judicial enforcement of religious arbitration agreements is an impermissible delegation turns on three key issues: first, whether the judicial enforcement of religious arbitration agreements is a delegation specific to religious groups, or merely the result of private choices; second, whether the delegation would be to the religious institutions or "bodies" of the appropriate type; and third, whether the power to resolve civil legal disputes is a core "governmental power" of the sort that may not be delegated to religious institutions. I will address each question in turn.

A. *Religion-Specific Delegation*

The first question to consider is whether the judicial enforcement of religious arbitration agreements is a religion-specific delegation made by the state. In the context of the nondelegation doctrine, a "religion-specific delegation" is a delegation made by the government to a specific religious institution or group, or to religious groups generally, rather than a broad delegation to individuals whose religious affiliation, if any, is incidental to the delegation.[57] For example, in *Kiryas Joel*, the state legislature passed a special

[57] *See id.* at 699 ("Where 'fusion' is an issue, the difference lies in the distinction between a government's purposeful delegation on the basis of religion and a delegation on principles neutral to religion, to individuals whose religious identities are incidental to their

law authorizing creation of a school district for the Village of Kiryas Joel in particular, fully aware of the fact that the village was populated exclusively by members of a Satmar Hasidic Jewish community.[58] The state's ad hoc or case-specific creation of a new school district just for this village is problematic because other similarly situated groups may not receive the same treatment.[59] Compare to *Commack v. Weiss*, a case in which a New York court struck down a state law defining and regulating the use of the word *kosher* on food labels in terms of a certain specific Orthodox Jewish understanding of that term.[60] The law was an unconstitutional delegation because it created an "advisory board on kosher law enforcement" composed exclusively of Orthodox Rabbis that was granted "extremely broad" power to oversee administration and enforcement of the law.[61] Appealing to *Larkin* and *Kiryas Joel*, the Second Circuit reasoned that the kosher food-labeling statute had the "primary effect" of "advanc[ing]" Orthodox Judaism over other Jewish groups, and also of "inhibit[ing]" other Jewish groups from "using the kosher label in accordance with their religious beliefs."[62] Thus, the effect of a religion-specific delegation

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receipt of civic authority.").

[58] *Id.* at 703 (the plurality reasoned that the legislature's authorization of this single school district was "anomalously [and] case-specific," preventing the Court from ensuring that the legislature was not acting in such a way as to "prefer one religion to another, or religion to irreligion.").

[59] *See id.* ("The fundamental source of constitutional concern here is that the legislature itself may fail to exercise governmental authority in a religiously neutral way. The anomalously case-specific nature of the legislature's exercise of state authority in creating this district for a religious community leaves the Court without any direct way to review such state action for the purpose of safeguarding a principle at the heart of the Establishment Clause, that government should not prefer one religion to another, or religion to irreligion" (citing Wallace v. Jaffree, 472 U.S. 38, 52–54 (1985); Epperson v. Arkansas, 393 U.S. 97, 104 (1968); Sch. Dist. Of Abington Twp. v. Schempp, 374 U.S. 203, 216–217 (1963))).

[60] Commack Self-Service Kosher Meats, Inc. v. Weiss, 294 F.3d 415, 418, 425 (2d Cir. 2002) (striking down a kosher food-labeling law according to which "kosher" foods must be "prepared in accordance with orthodox Hebrew religious requirements" on the grounds that the law would "create an impermissible fusion of governmental and religious functions by delegating civic authority to individuals apparently chosen according to religious criteria.").

[61] *Id.* at 418.

[62] *Id.* at 430 (holding that the challenged kosher food statutes "fail the second prong of the *Lemon* test"). For a case with similar facts and similar reasoning, *see* A.C.L.U. v. Sebelius, 821 F. Supp. 2d 474 (D. Mass. 2013) (holding that contract between the U.S. Department of Health and Human Services and a Catholic organization, according to which organizations would receive funding to aid victims of human trafficking on the condition that their services were not used to provide abortion services or contraceptive

is to impermissibly favor a particular religious group or religion generally as against those who do not receive the delegation.

The religion-specific delegations in *Larkin*, *Kiryas Joel*, and *Commack* may be contrasted with *State v. Yencer*, a North Carolina case involving a state law that authorized the state Attorney General to deputize employees of private colleges in the state as campus police officers.[63] The law extended this opportunity to all private colleges in the state, including religiously affiliated colleges.[64] When a citizen who was arrested by a campus police officer employed by a religious college challenged the constitutionality of the law on Establishment Clause grounds, the North Carolina Supreme Court held that because the law did not delegate authority to religious colleges in particular, but to all private colleges, the law was permissible under the nondelegation doctrine.[65] Because the law was of general application, there was no concern that different religions, or religion in general, had received impermissible favorable treatment.

Turning now to religious arbitration agreements, it may seem that in a given case, the court is not delegating authority to the religious arbitrator, but is simply deferring to the decision to arbitrate made by the parties to the agreement. If the government is making a delegation of authority, it is at the level of the state's generally applicable law or policy authorizing courts to enforce such agreements across the board, both religious and the (more

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materials, was an unconstitutional delegation because it vested the religious group with too much authority over how to execute the government's policy); vacated on mootness grounds, A.C.L.U v. United States Conf. of Catholic Bishops, 705 F.3d 44 (1st Cir. 2013). For a helpful discussion of kosher food-labeling cases, *see* Kent Greenawalt, *Religious Law and Civil Law: Using Secular Law to Assure Observance of Practices with Religious Significance*, 71 S. CAL. L. REV. 781 (1997).

[63] State v. Yencer, 718 S.E.2d 615 (N.C. 2011) (holding that general state law providing for the deputization of private college employees to serve as campus police officers was constitutional even when applied to private liberal arts college that was established by, and voluntarily affiliated with, the Presbyterian Church). Note that the holding in *Yencer* appears to conflict with, and essentially to overturn, an earlier North Carolina case with similar facts. *See* State v. Pendleton, 451 S.E.2d 274 (N.C. 1994) (holding under the Establishment Clause that state law deputizing private college employees to serve as campus police officers was unconstitutional as applied to religiously affiliated colleges). *See* discussion in Jun Xiang, *The Confusion of Fusion: Inconsistent Application of the Establishment Clause Nondelegation Rule in State Courts*, 113 COLUM. L.R. 777 (2013) (noting that neither the case law nor the statute at issue had changed in the years between *Pendleton* and *Yencer*).

[64] *Yencer*, 718 S.E.2d at 620.

[65] *Id.*

commonplace) nonreligious variety.[66] But unlike in *Larkin*, where the state delegated legal authority explicitly to churches, a policy that applies to both religious and secular arbitration agreements may not seem to involve a delegation to religious institutions. Unless there is an explicit or deliberate delegation to religious institutions, it may be unclear what makes delegation so problematic. After all, explicitly delegating authority to religious groups raises concerns about state favoritism toward religion, while explicitly excluding religious entities from a general policy would seem to raise concerns about state discrimination against religion.[67]

Generally applicable laws, which equally affect religious as well as nonreligious entities, do not constitute impermissible delegations. But with respect to religious arbitration agreements, the impermissible delegation may occur at the time of enforcement itself—that is, when the court enforces a religious arbitration agreement against a particular litigant in a specific case. In this respect, judicial enforcement of religious arbitration agreements may be analogous to the judicial enforcement of racially restrictive covenants at issue in *Shelley v. Kraemer*.[68] In this famous case, the U.S. Supreme Court held that courts may not enforce racially restrictive covenants against parties who sought to sell their land to African American (or non-white) buyers. Racially restrictive covenants were conditions added to property deeds that prohibited the sale of the property to non-white buyers and were an important aspect of the effort to "redline" or racially segregate cities and towns throughout the U.S.[69] Covenants that place restrictions on land use or sale are commonplace in property law and are routinely enforced by courts. But in *Shelley*, the Court held that judicial enforcement of racially restrictive covenants would amount to state engagement in the unconstitutional practice of racial segregation of housing. Although the covenants themselves were the product of private choices made by individual non-state actors—choices that

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[66] The Federal Arbitration Act (FAA), 9 U.S.C. §§ 1–16, applies to all contracts within the stream of commerce under the Commerce Clause of the U.S. Constitution.

[67] *Compare* to *Yencer*, 718 S.E.2d 615 (holding that a generally applicable a state law allowing employees of any private college in the state, including religiously affiliated colleges, to be deputized as campus police officers was not an impermissible delegation under the Establishment Clause).

[68] *See* Shelley v. Kraemer, 334 U.S. 1, 20 (1948) (holding that judicial enforcement of racially restrictive real estate covenants violates the Equal Protection Clause).

[69] See *for example* RICHARD R. W. BROOKS & CAROL M. ROSE, SAVING THE NEIGHBORHOOD: RACIALLY RESTRICTIVE COVENANTS, LAW, AND SOCIAL NORMS 162 (2013) (describing zoning laws, racially restrictive covenants, and the "ethics" codes of real estate professionals as among the mechanisms used to "legally" enforce racial segregation).

are typically respected by the private law and enforced by courts—the judicial enforcement of these covenants is a form of state activity that may have problematic effects both in the particular case and on society as a whole. For this reason, the judicial enforcement of racially restrictive covenants may be rightly subject to constitutional scrutiny.[70]

Much like racially restrictive covenants, religious arbitration agreements may not be a merely private matter, on par with other arbitration agreements that are generally enforced by courts. Enforcement of religious arbitration agreements may impact the legal rights of individual litigants, especially if the parties' respective religious beliefs or affiliations may affect the outcome of the arbitration. In addition, by analogy with redlining, consistent judicial enforcement of religious arbitration agreements may result in the fracturing of the legal landscape, whereby religious and nonreligious citizens adjudicate their private law disputes in separate legal venues. Judicial enforcement of religious arbitration agreements may also result in patterns of governmental favoritism toward certain religious groups, since some religious groups may be less sophisticated than others in drafting the agreements or in seeking their enforcement by courts, leaving them disadvantaged relative to other groups who have the requisite legal experience to execute the agreements. Inequality of enforcement is a special concern considering attempts by some U.S. state legislatures to impose restrictions on the ability of courts to consider Islamic law or Sharia.[71]

Because judicial enforcement of religious arbitration agreements may result in significant effects—both for individual litigants and for society as a whole—which are specific to religious arbitration agreements, there may be reason for the state to consider religious arbitration agreements separately from the nonreligious variety. Much like racially restrictive covenants, they are arguably different in kind from the garden-variety legal mechanism on which they are based. Given this difference, the state must decide whether or not to enforce them on the same terms as other arbitration agreements. This choice—whether it is made by a legislature or a court—ought to be subject to considerations of justice, and in the U.S. system, to principles of constitutional law. Enforcement of religious arbitration agreements thus seems to be a state activity, and not merely the result of the private choices of the parties to the agreement.

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[70] The "state action doctrine" aspect of *Shelley,* 334 U.S. 1 has been widely debated. *See, e.g.*, Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV 503, 524–25 (1985).

[71] *See* Awad v. Ziriax, 670 F.3d 1111, 1128–29 (10th Cir. 2012) (holding under the Establishment Clause that an Oklahoma law prohibiting courts from considering Sharia law in particular was unconstitutional because it singled out Islam).

To determine whether enforcement of religious arbitration agreements is a religion-specific delegation on the part of the government, we should look to the reasons why delegations are problematic. A delegation of governmental power to religious group is especially problematic when it is case-specific. A case-specific delegation leaves open the possibility that the government may not grant similar powers to other similarly situated religious groups. By making a case-specific delegation, the government risks favoring a particular religious group, or religion generally, as against those groups that may not receive a similar delegation. As in *Kiryas Joel*, the constitutionality of a delegation does not depend on an actual showing that the government has treated other religious groups unfairly; it is enough that the government has acted in a "case-specific" way, which "leaves the Court without any direct way to review such state action".[72] While courts may review generally applicable statutes and policies to determine whether they are discriminatory, review of the overall pattern of judicial enforcement or nonenforcement of arbitration agreements is unavailable.

Moreover, it seems likely that judicial enforcement of religious arbitration agreements may result in patterns of governmental favoritism toward certain religious groups, since there is no guarantee that courts will treat all religious arbitration agreements equally. Some religious groups may be less sophisticated than others in drafting the agreements or in seeking their enforcement by courts, leaving them disadvantaged relative to other groups who have the requisite legal experience to execute the agreements. Moreover, some religious groups might face implicit bias on the part of judges, leading to unequal patterns of enforcement. The presence of concerns about discriminatory treatment of different religious groups supports the conclusion that enforcement of religious arbitration agreements may be a religion-specific delegation for purposes of state action doctrine analysis.

B. *Delegation to a Religious Institution or Entity*

The second question to consider is whether the enforcement of a religious arbitration agreement will generally involve making a delegation to

[72] Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 703 (1994). ("The anomalously case-specific nature of the legislature's exercise of state authority in creating this district for a religious community leaves the Court without any direct way to review such state action for the purpose of safeguarding a principle at the heart of the Establishment Clause, that government should not prefer one religion to another, or religion to irreligion.").

a "religious institution."[73] The law at issue in *Larkin* delegated the power to veto liquor licenses to all churches or places of worship, which clearly qualify as religious institutions.[74] Similarly, the kosher food labeling law in *Commack* delegated authority to a panel of religious leaders acting, presumably, in their official religious capacity to provide guidelines and judgments about what food qualified as kosher.[75] Drawing on these examples, where a religious arbitration is conducted by an ordained religious leader or a religious official acting on behalf of a religious institution such as a church, there is little doubt that the delegation is being made to a religious institution for purposes of applying the nondelegation doctrine.

By contrast, the establishment of the school district at issue in *Kiryas Joel* was less obviously a delegation to a religious institution in the relevant sense. Recall that the statute in question delegated authority to create the school district to the citizens of Kiryas Joel, not to a religious institution. As Justice Scalia argued in dissent, Justice Souter's plurality opinion elides a distinction between the religious leaders of the Jewish community in Kiryas Joel, and the residents of the village who have actual legal authority to elect members of the school board.[76] It may have been likely that the voters would elect religious leaders who would have run the school district in a way that reflects the values and policies of the religious group—but this is an assumption based on no fact in the record.[77]

The comparably hard case in the context of religious arbitration is whether a lay arbitrator who makes reference to religious doctrines and texts, such as those certified by the Institute for Christian Conciliation ("ICC"), qualifies as a religious institution under the nondelegation doctrine.[78] It may be useful to compare the ICC-certified arbitrators to the religiously affiliated private college at issue in *Yencer*, Davidson College.[79] Davidson College is voluntarily affiliated with the Presbyterian Church of the United States of

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[73] *See* Larkin v. Grendel's Den, 459 U.S. 116, 127 (1982).

[74] *Id.* at 117 n.1 (noting that the state law at issue defined "church" to be "a church or synagogue building dedicated to divine worship and in regular use for that purpose").

[75] Commack Self-Service Kosher Meats, Inc. v. Weiss, 294 F.3d 415 (2d Cir. 2002).

[76] *Cf. Kiryas Joel* 512 U.S. at 734–35 (Scalia, J., dissenting) (arguing that under *Larkin*, a delegation is impermissible only if it is a delegation of "civil authority *to a church*" (italics in original)).

[77] *Cf.* Christopher L. Eisgruber, *Madison's Wager: Religious Liberty in the Constitutional Order*, 89 NW. U. L. REV. 347, 402–08 (1995) (arguing that the Kiryas Joel school district was an unconstitutional segregation of public school students along religious lines, not a delegation).

[78] *See supra* Part I.

[79] *See generally* State v. Yencer, 718 S.E.2d 615 (N.C. 2011).

America, and its bylaws require that its President be a member of that Church.[80] Davidson does not, however, require that students or faculty have religious affiliation or attend religious services.[81] The court in *Yencer* held that Davidson was not a religious institution in the relevant sense, reasoning that its "predominate purpose" is to provide "secular education."[82]

How, then, should a court determine whether enforcing a religious arbitration conducted by a layperson is a delegation to a religious institution in the relevant sense? The *Yencer* court suggests a test—that is, courts should not look at the nominal religious or nonreligious affiliation of the delegated institution, but should determine whether the "predominate purpose" of the institution is secular or religious. Given this test, a religiously affiliated arbitrator providing secular arbitration services may not qualify as religious under the nondelegation doctrine. But there are reasons to think that ICC-certified arbitrators would qualify as religious. As discussed in Part I, ICC arbitrators must follow the *Rules of Procedure for Christian Conciliation*, according to which "the Holy Scriptures (the Bible) shall be the supreme authority governing every aspect of the conciliation process."[83] Moreover, certified Conciliators must take a pledge according to which "we believe that we are called to respond to conflict in a way that is remarkably different from the way the world deals with conflict."[84] These facts about ICC-based arbitration suggest that the "predominate purpose" of such arbitration may be religious, rather than secular.

In sum, the enforcement of a religious arbitration agreement will typically result in a delegation to a religious body or institution under the nondelegation doctrine. There may be some vagueness or ambiguity about what qualifies as a "religious institution" for the purposes of the doctrine: churches and ordained religious leaders acting in their official capacity are clear cases, while religiously affiliated laypersons may not be. Applying the test suggested by the court in *Yencer*, whether the institution or individual who conducts the arbitration is "religious" under the nondelegation doctrine may depend on whether the "predominate purpose" of conducting the arbitration is religious. Thus, it may matter whether the arbitrator views itself as providing

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[80] *Id.* at 618–19.

[81] *Id.*

[82] *Id.* at 621–622.

[83] The Institute for Christian Conciliation: Dispute Resolution Services, *supra* note 29.

[84] *See Peacemaker's Pledge*, PEACE MAKER MINISTRIES (Jan. 19, 2018), http://peacemaker.net/project/peacemakers-pledge/.

a predominately secular legal service, or as providing a predominately religious mediation or reconciliation service.

C. *Effective Control Over an Important Governmental Power*

The final factor to consider is whether, by enforcing a religious arbitration agreement, a court has made a delegation of an "important" or "core" governmental power, i.e., one that is "ordinarily vested in agencies of government."[85] In *Larkin*, the power in question is the power to grant liquor licenses; in *Kiryas Joel*, it is the power to administer a public school district; in *Commack*, it is the power to regulate food labeling. These powers are not distinctive because the government may never delegate them—indeed, the Court in *Larkin* suggested that the government could permissibly delegate its authority to issue liquor licenses to a nongovernmental entity, as long as it were not religious.[86] Instead, what distinguishes these important or core governmental powers is that they all bear the government's imprimatur—i.e., they are functions that, within our current system, are closely associated with governmental authority, and over which the government is assumed to have primary legal or political authority and for which the government bears ultimate moral and political responsibility. For example, the government has primary authority to enforce the criminal law, and yet the government is not the only actor allowed in the domain: citizens have the authority to make arrests in some cases, and the government may delegate some functions to private actors such as private prisons, or the campus police at issue in *Yencer*. But enforcement of the criminal law is an important governmental power, since, like public education and food and liquor regulation, the government bears ultimate responsibility for its enforcement and oversees all other actors in the domain.

An impermissible fusion may occur when the government delegates effective or de facto control over one of these important powers to a religious institution. In *Larkin*, the Court argued that the law at issue granted churches "unilateral and absolute power" to exercise a veto over liquor licenses within the 500-foot zone.[87] Although the government retained primary de jure

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[85] Larkin v. Grendel's Den, 459 U.S. 116, 122 (1982).

[86] *Id.*; *See also* a subsequent case involving the same plaintiff, Commack Self-Service Kosher Meats, Inc. v. Hooker, 680 F.3d 194 (2d Cir. 2012) (upholding against constitutional challenge a state law allowing any ordained Rabbi to certify food "kosher" for purposes of food labeling on the grounds that the state had effectively exited the domain of kosher food labeling).

[87] *Larkin*, 459 U.S. at 127.

authority to grant liquor licenses, the law at issue allowed churches to act as the de facto liquor license board with respect to the area around their property. Similarly, in *Kiryas Joel*, the Court was concerned that, although the school district would be public in name, the religious leaders in the village would acquire de facto control over many aspects of the schooling.[88] And in *Commack*, the impermissible delegation resulted from the fact that the board of Orthodox Rabbis was granted de facto authority to determine which foods may be labeled kosher according to state law.[89] In all three cases, a religious institution or group acquires unilateral or absolute de facto control over a governmental function, as evidenced by the fact that it would it be effective to petition the religious institution directly about a delegated matter rather than petition the state. Under the facts in *Larkin*, if someone sought to open a liquor store within 500 feet of a church, she would likely need to seek the permission of the church directly. Similarly, if a grocer wanted to label its food kosher given the law in *Commack*, it should seek the approval of the Board of Orthodox Rabbis rather than the government agency. Thus, an impermissible fusion results when a religious institution or group acquires absolute or unchecked de facto control over a function that nevertheless remains legally under primary governmental authority.

Turning to religious arbitration agreements, there is a strong argument that the adjudication and enforcement of the private law is one of the government's core functions in the sense that this power is "ordinarily vested in agencies of government."[90] Adjudication and enforcement of the private law ordinarily bears the government's imprimatur, as evidenced by the fact that civil courts are housed in public buildings and staffed by government employees. Moreover, enforcement of civil law is backed by the state's authority to use coercive force. The state's civil law adjudication is not simply a form of nonbinding mediation—the state may resort to coercive force to render judgments when necessary. Private actors may have a role to play, including drafting enforceable contracts, filing lawsuits, and even private arbitrators helping to resolve disputes. But so long as the state's coercive enforcement may be brought to bear, the state bears ultimately responsibility for the outcome. It may be possible, in theory, for the government to surrender its de jure authority to enforce the civil law, by ceding the authority to govern

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[88] Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687 (1994).

[89] *Commack Self-Service Kosher Meats, Inc.*, 294 F.3d at 418.

[90] *See, e.g.*, CHARLES DE MONTESQUIEU, THE SPIRIT OF LAWS [1748], Book XI, Ch. VI, 156-57 (Anne M. Cohler, Basta C. Miller, & Harold Stone trans., 1989) (identifying the state's "power of judging" as the power to "punish[] crimes or judge[] disputes between individuals").

all private noncriminal interactions between citizens to nongovernmental institutions. It is unclear whether surrendering authority would be consistent with maintaining a coherent form of government.[91] But even if such a forfeit of governmental authority over civil law enforcement were possible, it has not yet taken place in the U.S.

Assuming that civil law enforcement is a core legal function, the second aspect of impermissible delegation is whether enforcement of a religious arbitration agreement allows a religious institution to acquire significant control over the enforcement of the civil law. There is a strong argument that enforcement of such agreements does result in the acquisition of significant control by religious institutions. Litigants who have entered into such agreements are prevented from seeking alternative means of adjudication. And awards or judgments issued by religious arbitrators may be enforced by the state's civil court, including through use of coercion. Although courts retain the ability to review arbitration awards, courts routinely enforce those awards except in special cases, such as child custody awards.[92] Thus the awards issues by religious arbitrators are roughly as binding on litigants as the awards issued by the state's civil courts. And because the proceedings may be private, religious arbitrators have arguably more leeway and less precedential constraint in making their judgment.

Enforcement of religious arbitration agreements may be contrasted with a limited delegation in which the government retains control over the delegated function. Consider *State v. Yencer*, a North Carolina case involving a law allowing the state to deputize employees of private colleges, including religiously affiliated colleges, as campus police officers with the power to issue tickets and make arrests.[93] Although this is a close case, it could be argued that deputized officers at religious colleges did not acquire sufficient control over criminal law enforcement to raise constitutional concerns.[94] After all, whatever enforcement action a campus police officer might take will be subject to the review of a criminal court, not simply the campus police or the

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[91] Note that even Robert Nozick's vision of utopian form of government the "minimal state" would have the power to enforce contracts. *See* ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974).

[92] Courts generally claim a *parens patriae* responsibility to determine whether a child custody award issued by an arbitrator is in the child's best interests. *See* Jack Ratliff, *Parens Patriae: An Overview*, 74 TUL. L. REV. 1847 (1999).

[93] State v. Yencer, 718 S.E. 2d 615 (N.C. 2011) (upholding law deputizing private college campus police offices against Establishment Clause challenge).

[94] *Compare Yencer* with an earlier North Carolina case with similar facts, *State v. Pendleton*, 451 S.E.2d 274 (N.C. 1994) (holding under the Establishment Clause that state law deputizing private college employees to serve as campus police officers was unconstitutional as applied to religiously affiliated colleges).

college administrators. Any ticket or arrest issued by a police officer may be challenged before a criminal judge, and the campus police have no authority to render criminal judgments. So, although campus police may exercise coercive authority at the point of arrest, they may lack the level of control that would result in an impermissible delegation of the state's authority over the criminal law.

By contrast, enforcement of religious arbitration agreements provides religious arbitrators with significant control over civil law enforcement. The judgments issued by religious arbitrators are binding on the litigants in civil court. And civil courts may often enforce the awards issued by religious arbitrators directly, without conducting a separate trial or review of the arbitration proceedings. Thus, it may be that enforcement of religious arbitration agreements is an impermissible delegation of the government's power to enforce of the civil law.

D. *Practical Implications of Nonenforcement*

This Part has argued that the judicial enforcement of religious arbitration agreements may be an impermissible delegation under the Establishment Clause. It is worth noting that this argument for the nonenforcement of religious arbitration agreements is consistent with the continued employment of a number of related alternative dispute resolution mechanisms. First, persons who are motivated by their religious beliefs to avoid litigating their disputes in civil court may continue to employ secular arbitration agreements in their contractual relationships. Additionally, religious persons and groups may continue to employ nonbinding religious arbitration or mediation to reach mutually acceptable settlements of legal disputes. Parties may use contractual agreements to specify which specific religious authority or tribunal will be relied upon to resolve disputes regarding questions of religious doctrine.[95] And religious institutions could still provide nonbinding religious mediation services. This mediation, if successful, could prompt the parties to agree to a binding settlement agreement, which would resolve their legal dispute. But crucially, in the context of nonbinding mediation, both parties must voluntarily agree to a settlement at the time of

[95] *See* McCarthy v. Fuller, 714 F.3d 971, 975–76 (7th Cir. 2013) (noting that the religious question doctrine is difficult to apply in cases where there is no clear religious hierarchy, such as congregational churches, and so courts may be required to find some "neutral principle" on which to base their legal decision, rather than attempt to decide a religious question).

mediation, after the dispute has arisen—not in advance of any dispute as with a binding arbitration agreement.

Finally, the nondelegation argument presented here would not prevent courts from requiring the specific performance of Jewish husbands who have agreed to resolve marital disputes through a beth din or Rabbinical Court.[96] While a civil court would retain the authority to determine the terms of the divorce, such as spousal support, division of marital assets, and child custody, the court could compel the husband to go before a beth din, which in turn could convince him to sign a get.[97] Ordering specific performance in such cases is not a delegation of governmental powers, since the government does not have the authority to issue religious divorces. Rather, the religious arbitration agreement would be treated as a contract to perform a certain action—namely, agree to a religious divorce in the event of a civil divorce—rather than a provision providing for alternative dispute resolution with respect to the terms of the divorce itself.

V. RELIGIOUS ARBITRATION AND THE RELIGIOUS QUESTION DOCTRINE

Part III argued that judicial enforcement of religious arbitration agreements could run afoul of the Establishment Clause nondelegation doctrine. When courts have addressed the Establishment Clause in cases involving religious arbitration agreements, however, they often refer to the religious question doctrine, arguing that because they can enforce a religious arbitration agreement without deciding any questions about religious doctrine, they should do so.[98] But there is a strong argument that courts have misapplied the religious question doctrine to religious arbitration agreements. Instead of ceding decisionmaking authority to religious arbitrators, courts should seek to resolve the underlying civil law dispute between the parties. So understood, the religious question doctrine supports, rather than conflicts with, the result that enforcement of religious arbitration agreements may violate the Establishment Clause.

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[96] *See* Avitzur v. Avitzur, 446 N.E.2d 136 (N.Y. 1983).

[97] *See* Greenawalt, *supra* note 17 (discussing concerns about religious freedom arising from courts ordering specific performance in such cases).

[98] *See* Encore Productions, Inc. v. Promise Keepers, 53 F. Supp. 2d 1101, 1112 (D. Colo. 1999) ("A court can, and should, apply neutral principles of law to determine disputed questions that do not implicate religious doctrine" (citing Jones v. Wolf, 443 U.S 595 (1979).).

A. *The Argument in Favor of Enforcement*

The religious question doctrine states that courts may not resolve questions or controversies about religious doctrine.[99] Instead, civil courts should typically defer to the highest religious authority for a resolution, at least where the religious institution is organized hierarchically.[100] The religious question doctrine typically applies where courts are faced with a legal dispute (such as a dispute involving employment or church property) between two members of a religion or representatives of a religious institution, where their legal dispute depends in some way on a question about religious doctrine, such as who may rightly claim to be an ordained religious leader. For example, in *Serbian Orthodox Diocese v. Milivojevich*, a bishop who had been formally defrocked by his Mother Church argued that he retained control of church assets on the grounds that the defrocking procedure was flawed.[101] The Supreme Court denied the bishop's claim on the grounds that the defrocking procedure was a matter of "internal discipline and government" within a "hierarchical religious organization," and the First Amendment requires courts to accept as binding "the decisions of the highest ecclesiastical tribunal within a church of hierarchical polity" with respect to "religious issues of doctrine or polity."[102]

On the other hand, the religious question doctrine allows courts to decide legal disputes if they can do so solely by reference to "neutral principles of law," that is, principles that do not depend on resolving questions about religious doctrine.[103] In *Jones v. Wolf*, for example, the Court decided a

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[99] *See* Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 449 (1969) (holding that courts may not decide controversies about religious doctrine).

[100] *See* Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 710 (1976) (holding that the First Amendment prohibits civil courts from resolving church property disputes on the basis of religious doctrine and practice); *See also* Kedroff v. Saint Nicholas Cathedral, 344 U.S. 94 (1952) (holding that Supreme Church Authority of the Russian Orthodox Church in Moscow had authority to appoint the archbishop who controlled church property in the U.S. over objections from North American churches that the Supreme Authority was under the influence of the Soviet government).

[101] *Milivojevich*, 426 U.S. at 707.

[102] *Id.* at 709, 723 (citing Md. & Va. Churches v. Sharpsburg Church, 396 U. S. 367, 369 (1970) (Brennan, J., concurring)).

[103] *See Presbyterian Church in U.S.*, 393 U.S. at 449 ("[T]here are neutral principles of law, developed for use in all property disputes, which can be applied without 'establishing' churches to which property is awarded."); *Cf.* Kent Greenawalt, *Hands Off!*

property dispute between rival factions of a Presbyterian congregation in Georgia, by taking into account deeds and state statutes governing church property, as well as the local church's charter and the general church's constitution.[104] Although the schism was caused by disagreement about religious matters—namely, whether to separate from the U.S. branch of the Presbyterian Church—the Court held that it did not need to resolve this religious issue in order to resolve the property dispute.[105] Furthermore, the Court suggested that it is beneficial for courts to resolve legal disputes among coreligionists by reference to "neutral principles of law" rather than deferring to the decisions of religious authorities.[106] Deciding legal disputes on the basis of neutral principles of law allows courts to better reflect the interests and desires of church members, by allowing them to effectively opt-out of religious hierarchies by means of legal instruments such as trusts and deeds.[107] Moreover, a neutral principles analysis can allow courts to avoid the often-vexed question of what body actually is the "highest ecclesiastical tribunal" within a religious organization.[108]

Following *Jones*, some courts have interpreted the neutral principles of law approach to create a requirement that courts resolve civil disputes between coreligionists on the basis of neutral principles whenever possible—including by means of enforcing religious arbitration agreements.[109] Enforcing

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Civil Court Involvement in Conflicts over Religious Property, 98 COLUM. L. REV. 1843, 1844 (1998) (describing the religious question doctrine, also known as the "hands-off" approach, as requiring civil courts to "choose between deferring to judgments made by a group's hierarchy or using neutral principles of law," to decide the case, such as "documents that do not require controversial interpretations of doctrines or practices").

[104] *See* Jones v. Wolf, 443 U.S. 595 (1979).

[105] *Id.* at 597–98.

[106] *Id.* at 604 ("[T]he promise of nonentanglement and neutrality inherent in the neutral-principles approach more than compensates for what will be occasional problems in application,").

[107] *Id.* at 603 ("[T]he neutral-principles analysis shares the peculiar genius of private-law systems in general [namely] flexibility in ordering private rights and obligations to reflect the intentions of the parties.").

[108] *Cf. Jones*, 443 U.S. at 605. *See also* Tomic v. Catholic Diocese of Peoria 442 F.3d 1036, 1039 (7th Cir. 2006); McCarthy v. Fuller 714 F.3d 971, 975–76 (7th Cir. 2013) (noting that the religious question doctrine is difficult to apply in cases where there is no clear religious hierarchy, such as congregational churches, and so courts may be required to find some "neutral principle" on which to base their legal decision, rather than attempt to decide a religious question).

[109] *Cf.* Encore Productions, Inc. v. Promise Keepers, 53 F. Supp. 2d 1101, 1112–13 (D. Colo. 1999) (granting a motion to compel religious arbitration on the grounds that that a "court can, and should, apply neutral principles of law to determine disputed questions

a religious arbitration agreement requires courts to apply only the FAA (or similar state statue) and basic contract law doctrine, not to answer questions of religious doctrine. For example, in *Meshel v. Ohev Sholom Talmud Torah*, the D.C. Circuit reasoned that by enforcing the parties' arbitration agreement, the court avoided the need to decide the parties' underlying dispute regarding the interpretation of religious terms such as "Din Torah" and "Orthodox."[110] Moreover, religious arbitration agreements, much like trusts and deeds, allow parties autonomy over their legal relationship, such as what religious rules or doctrine will govern their relationship and what religious authority will resolve any dispute between them.[111] Thus the religious question doctrine, and the neutral principles of law approach found in *Jones v. Wolf*, may seem to support enforcement of religious arbitration agreements.

B. *Evaluating the Argument*

But it is not clear that the religious question doctrine, and the neutral principles of law approach, is best understood to create a presumption in favor of enforcement of religious arbitration agreements. On the contrary, the purpose of allowing courts to decide civil disputes on the basis of neutral principles of law was to avoid the need for courts to defer to the judgments of religious authorities.[112] While it is true that enforcing religious arbitration agreements may have benefits for courts and for the parties, the primary effect of enforcement is that a religious arbitrator will decide a legal dispute that perhaps could have been decided by a civil court. This effect flies in the face of the reasoning in *Jones v. Wolf*, where the Court appealed to neutral principles of law in order to provide courts with more, rather than less, opportunity to decide legal disputes between coreligionists. As an alternative, courts should look to the underlying civil law dispute to determine whether it

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that do not implicate religious doctrine" (citing Jones v. Wolf 443 U.S. 595 (1979)).).

[110] Meshel v. Ohev Sholom Talmud Torah, 869 A.2d 343, 354 (D.C. 2005). For a contrary opinion, *see* Sieger v. Sieger, 297 A.D.2d 33 (N.Y. App. Div. 2002) (finding that interpreting a contractual provision that required the parties to resolve their disputes "in accordance with the regulations of Speyer, Worms, and Mainz" would require the court to make a determination regarding religious doctrine and was therefore prohibited under the Establishment Clause).

[111] Absent such a prior agreement, courts must determine who is the relevant religious authority, which might often itself be a matter of controversy. *See* Jones v. Wolf 443 U.S. 595 (1979)).

[112] *See Jones*, 443 U.S. at 603–04.

can be resolved by appeal to neutral principles, and only defer to the specified religious arbitration tribunal when it cannot.

As an illustration of this approach, consider *Spivey v. Teen Challenge*, a case in which a mother filed a wrongful death suit against a Christian drug rehabilitation facility, alleging that the facility negligently released her son from its care shortly before he died of multiple drug toxicity.[113] Because the son had signed an arbitration clause upon first entering the facility, the court dismissed the mother's wrongful death suit on the grounds that, as representative of the son's estate, the arbitration agreement was binding upon her. But here it seems likely that the validity of the mother's wrongful death claim does not depend on answering any religious questions. The facility had released the decedent son because he ingested cough syrup in violation of the facility's rules.[114] But the court likely could have determined whether the facility was negligent by reference to neutral principles of tort law, without deciding any religious questions such as whether, in violating the facility's rules, the son failed to perform his religious obligation. Even if drinking the cough syrup were a violation of the son's religious obligation, the facility would not have been absolved of its legal duty of care. Nor, for that matter, must the mother show that the facility failed to perform its religious obligations—the question is entirely a legal one. As such, in cases where adjudicating the underlying legal claim does not depend on resolving a question of religious doctrine, there is no reason for courts to aggressively interpret the religious question doctrine to require enforcement of religious arbitration agreements. Consistent with this argument, parties may continue to utilize religious arbitration agreements to specify which religious authority would be appointed to decide a "religious question"—i.e., a question of religious doctrine rather than a question of civil or private law. Thus, parties could agree in advance to submit their disputes regarding questions of religious doctrine to a religious body or authority, allowing courts to avoid answering the complicated question of which authority is highest in a given case.

C. *Hosanna-Tabor and Church Autonomy*

The interpretation of the religious question doctrine described in Section B appears to be at odds with the Supreme Court's decision in

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[113] Spivey v. Teen Challenge of Florida, 122 So. 3d 986, 989 (Fla. Dist. Ct. App. 2013).

[114] *Id.*

Hosanna-Tabor v. E.E.O.C. [115] *Hosanna-Tabor* involved an employment discrimination claim, this time brought by a teacher at an Evangelical Lutheran elementary school, who was fired after she developed narcolepsy. The Court held, under the "ministerial exception," that religious institutions are protected from employment discrimination laws when hiring or firing "ministers," i.e. those whose employment involves the performance of religious duties.[116]

Some scholars have argued that *Hosanna-Tabor* should be read to endorse a broad view of deference to religious institutions, according to which religious institutions ought to have a "sovereign" authority over their own internal affairs and the affairs of their members.[117] In this respect, *Hosanna-Tabor* might reflect an emerging thread of Establishment Clause doctrine, sometimes labeled the "church autonomy doctrine."[118] According to church autonomy doctrine, courts should grant religious institutions broad leeway to oversee their internal affairs, including matters that are typically regulated by the state, such as employment and the provision of social services such as education and healthcare. And, as some scholars have argued, religious arbitration agreements may provide an additional way to insulate various

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[115] Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC., 565 U.S. 171 (2012) (holding, under both Religion Clauses, that the ministerial exception barred teacher's employment discrimination claim brought under the Americans with Disabilities Act).

[116] The term "minister" carried a lot of weight in the decision and its proper meaning in this context remains up for debate. *Cf. Hosanna-Tabor*, 565 U.S. at 197 (Thomas J., concurring) (arguing that civil courts must "to defer to a religious organization's good-faith understanding of who qualifies as its minister" rather than make that determination themselves). The ministerial exception is often thought to be a component, along with the religious question doctrine, of a broader "hands-off" approach that courts should adopt when dealing with religious institutions. *Cf.* Greenawalt, *supra* note 17.

[117] *See* Michael A. Helfand, *Religion's Footnote Four: Church Autonomy as Arbitration*, 97 MINN. L. REV. 1891 (2013) (arguing that in order to reconcile *Hosanna-Tabor* with the Court's prior Free Exercise doctrine, the decision should be read as "lay[ing] the groundwork for conceptualizing church autonomy as a constitutionalized version of [religious] arbitration"); Paul Horwitz, *Act III of the Ministerial Exception*, 106 NW. U. L. REV. 973–93 (2012).

[118] *See* Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373 (1981); *See also* Richard W. Garnett, *Do Churches Matter? Towards an Institutional Understanding of the Religion Clauses*, 53 VIL. L. REV. 273 (2008); Paul Horwitz, *Churches as First Amendment Institutions: Of Sovereignty and Spheres*, 44 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 79 (2009); Michael A. Helfand, *Litigating Religion*, 93 B.U. L. Rev. 493 (2013) (arguing that courts should return to an approach of institutional deference rather than adopt the religious question doctrine).

aspects of religious institutions from the scrutiny of civil courts, subject to the consent of both parties to the agreement.[119] As such, the church autonomy doctrine may be interpreted to lend constitutional support to the enforceability of religious arbitration agreements.[120]

But the church autonomy doctrine does not provide a stand-alone argument in favor of enforcing religious arbitration agreements. It is true that any additional autonomy secured by religious institutions as a result of religious arbitration agreements will be a function of the choices of individuals to sign the agreements. But it is not clear that the extent of constitutionally permissible authority that a religious institution may exercise over its members or others should be determined by private choices. Determining the correct constitutional balance between church autonomy and the rights and interests of the church's members is a question for courts to answer, not for parties to stipulate in advance.[121]

In sum, this Part of the Article argued that the neutral principles of law approach employed in *Jones v. Wolf* could be interpreted to support the nonenforcement of religious arbitration agreements, rather than their enforcement. Courts should seek to decide legal disputes wherever possible, rather than deferring to religious authorities, including religious arbitrators. In keeping with the spirit of *Jones v. Wolf*, the religious question doctrine should be interpreted to require nonenforcement of religious arbitration agreements. As such, the religious question doctrine need not conflict with the nondelegation doctrine analysis described in Part III.

VI. CONCLUSION

This Article presented an argument that judicial enforcement of religious arbitration agreements may violate the Establishment Clause. According to the Establishment Clause's nondelegation doctrine, the government may not delegate its important or core functions to religious institutions where that results in a "fusion" of governmental and religious functions—i.e., where the religious institution has an opportunity to carry out

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[119] *See generally* Helfand, *supra* note 5.

[120] *Id.*

[121] This balance may be responsive to, among other things, the members' freedom of association rights, private rights, and perhaps the freedoms of the institutions themselves. *See* Boy Scouts of America v. Dale, 530 U.S. 640, 644 (2000) (holding that freedom of association allowed the Boy Scouts to fire a scout leader for being gay). For a discussion of this case and the scope and purpose of freedom of association, *see generally* Seana Valentine Shiffrin, *Essay: What Is Really Wrong With Compelled Association*, 99 NW. U. L. REV. 839 (2004).

a governmental function according to its religious doctrines or principles. This Article argued that enforcement of religious arbitration agreements may result in such an impermissible fusion, especially in cases in which the arbitrator acts with a predominately religious purpose. Enforcement of religious arbitration agreements may be consistent with the Establishment Clause, but only where the court determines that the underlying legal dispute turns on a question of religious doctrine. Finally, even if the constitution prohibits (or limits) the enforceability of religious arbitration agreements, there are a range of alternative dispute mechanisms that may still be available to religious persons and institutions, including non-binding mediation services and secular arbitration.